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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 287.

JAMES M. T. GLEESON, PLAINTIFF IN ERROR,

vs.

THE VIRGINIA MIDLAND RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 27, 1887.

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1 In the Supreme Court of the District of Columbia, the 10th Day of July, 1883.

Declaration. Filed July 10, 1883.

JAMES M. T. GLEESON, Plaintiff,
vs.
THE VIRGINIA MIDLAND RAILROAD COMPANY, Defendant. } At Law. No. 24593.

The plaintiff sues the defendant, a body corporate under the laws of the State of Virginia, doing business and having agents and officials in the District of Columbia, for that the defendant, on the night of the fifteenth day of January, 1882, was the owner of a certain railroad lying between the cities of Alexandria and Danville, in the State of Virginia, and was the lessee for certain purposes of the railroad lying between the cities of Washington, in the District of Columbia, and Alexandria, in the State of Virginia, and was also the owner of a certain locomotive and cars, all of which were used by the said defendant for the conveyance of passengers and persons lawfully upon said cars between the cities of Washington, in the District of Columbia, and Danville, in the State of Virginia, and the defendant still is owner and lessee as aforesaid.

That on the said fifteenth day of January, 1882, the defendant received the plaintiff into the mail car attached to a train of
2 their said cars on said leased road at Washington, D. C., the plaintiff being at that time a railway post-office head clerk, duly commissioned to serve as such upon the cars of the defendant running between the said city of Washington, D. C., and Lynchburgh, Va., and frequently ordered to Danville, Va., and it was incumbent upon the plaintiff, in the proper discharge of his duty as head clerk aforesaid, to be present in said car at the time and place stated and take passage in the same and remain therein during the transit of said car to Danville aforesaid; that the defendant then and there undertook and it became its duty to safely convey the plaintiff over the said railroad in the said mail car, drawn by steam-power, to the said city of Danville, and in so doing to exercise great care and diligence and skill, and certain agents and servants of the defendant had the control and management of the locomotive drawing the said train of cars to which the said mail car wherein the plaintiff was received by the defendant was attached, and which the plaintiff entered, trusting to the faithful performance by the defendant of its duty and undertaking aforesaid.

That yet the defendant, notwithstanding its said duty and undertaking, conducted itself so negligently by its servants that, by reason of such negligence, while the said mail car and train were upon the road owned by the said defendant, and while the plaintiff was within said mail car actively engaged in the performance of his duty as postal clerk aforesaid, and himself in the exercise of due and proper care, on the night of the said 15th day of January,

1882, in the county of Nelson, in the State of Virginia, be-
3 tween Faber's Mills (*alias* Orlando) and Rock Fish station, on said Virginia Midland railroad, he was thrown from the center of the car, where he was attending to his duties, against the stove at the end of the car, and thence against the letter case at the end of the same, striking his side and head and so burning and bruising and otherwise harming the plaintiff as to produce serious, painful and permanent mental and physican injuries; that by the collision with the said stove two of plaintiff's ribs were fractured, from which injury, although he has had the attention of a skilful physician, he still suffers pain and inconvenience and cannot lie upon the injured side; that the striking of his head against the letter case at the same time and under the same circumstances rendered the plaintiff unconscious; that the injury to his head so inflicted was marked at the time by contusion and swelling and the said injuries resulted in the incapacity of the plaintiff to perform his duties as postal clerk, both by reason of physical disability and mental derangement, which was manifested in bewilderment and confusion of ideas, in consequence whereof he was granted a leave of absence for thirty days; that he at once engaged a competent physician, who has continued to prescribe for and treat him with care and skill for said injuries, mental and physical, but has been unable to effect a cure; that at the expiration of the leave of absence aforesaid the plaintiff undertook to resume his occupation as postal clerk and applied himself to the best of his ability thereto; that

this effort was attended with pain and suffering and incon-
4 venience, and, notwithstanding skilful medical treatment and earnest and protracted endeavor, he found that by reason of his said injuries he was incapable of efficiently performing his duties; that his record, which prior to the infliction of said injuries had been among the best, thereafter depreciated; that by reason of said injuries to his head the plaintiff was unable to study or endure the tension of an examination, inasmuch as close and continual application to any subject resulted and still results in violent pain in the head and absolute mental confusion; that the deficiencies in the performance of his duties and in the passing of examinations thus resulting from his said injuries led to dissatisfaction among his superiors and finally to his discharge on the 23d day of May, 1883; that, furthermore, since the infliction of the said injury to plaintiff's head as aforesaid his hearing has been impaired, a direct result, he believes, of the violent contact of his head with said letter case.

That the plaintiff is still compelled to engage the services of a physician and take medicine for said injuries and cannot endure exposure to the sun and cannot read to the extent of a column in a newspaper without pain in the head and mental perplexity, and, inasmuch as his condition does not improve under skilful medical treatment, he believes his said injuries incurable and that they have permanently impaired his health and shortened his life.

That by reason of the premises the plaintiff has been obliged to pay and lay out divers sums of money in providing medical at-

tendance and divers necessities and has lost time and been
5 interferred with in his business to the present time to the extent at least of five hundred dollars ($500.00).

That the defendant is a corporation owning a steam railroad; that the plaintiff was a passenger on said railroad, was within a car of said railroad by the leave of defendant, and was lawfully within the car of defendant, and by reason of the collision of the train in which the plaintiff was riding, with a mass of rock and earth lying upon the defendant's track, through the negligence of the defendant and its agents and servants, the plaintiff was hurt; that the defendant did not use due care in regard to the train in which plaintiff was riding, but the plaintiff did use due care.

Wherefore the plaintiff claims damages in the sum of fifteen thousand dollars ($15,000) and the costs of this suit.

I. H. FORD,
Att'y for Plaintiff.

The plaintiff is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

I. H. FORD,
Att'y for Plaintiff.

Summons. Issued July 10th, 1883.

In the Supreme Court of the District of Columbia, the 10th Day of July, 1883.

6 JAMES M. T. GLEESON, Plaintiff,
vs.
THE VIRGINIA MIDLAND RAILROAD COMPANY, Defendant. } At Law. No. 24593.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the first day of its special term occurring 20 days after service of this writ on you, to answer the plaintiff's suit and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, cheif justice.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Clerk.*

I. H. FORD, *Attorney.*

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

Marshal's Return.

Served copies of the declaration, notice to plead, affividavit, and this summons on the defendant by service on M. McDaniel, agent of said defendant, the 10th day of July, 1883.

CLAYTON McMICHAEL, *Marshal.*

7 *Plea to the Jurisdiction. Filed Aug.* 3, 1883.

In the Supreme Court of the District of Columbia.

JAMES M. T. GLEESON
vs.
THE VIRGINIA MIDLAND RAILWAY CO. } At Law. No. 24593.

And now comes the defendant, by its attorney, Linden Kent, and says that the court ought not to have or take further cognizance of said action, because at the time of suing out and serving said writ that the defendant had no principal officer or general place of business in the District of Columbia; that it had an office within said District and an agent therein for the sale of tickets to passengers and with such powers and duties alone as were incident thereto, and that the defendant has no line of railway extending within said District.

That the alleged injury complained of occurred within the State of Virginia and had no relation or connection in anywise with the business done by the said defendant within the District of Columbia, and that the said agent of the said defendant within the District of Columbia in the conduct of the business therein prosecuted by the said defendant had no agency duty or power relating to the said complainant or his duties or presence upon said train of cars of the defendant out of which the said alleged injury resulted.

8 And this the defendant is ready to verify. Wherefore *he* prays judgment whether this court can or will take further cognizance of the action aforesaid.

LINDEN KENT,
Att'y for Virginia Midland R'y Co.

Replication to Def't's Plea. Filed Aug. 9, 1883.

In the Supreme Court of the District of Columbia, the 9th Day of August, 1883.

JAMES M. T. GLEESON
vs.
THE VIRGINIA MIDLAND RAILROAD COMPANY. } At Law. No. 24593.

And now comes the plaintiff, by his attorney, I. H. Ford, and says that, notwithstanding anything by the defendant alleged in *his* plea to the jurisdiction of this court, filed herein on the 3d day of August,

1883, the court here ought not to be precluded from having further cognizance of this cause, because he says that at the time of the injury to the plaintiff set forth in the declaration and at the time of the service of the summons herein and continuously from the date of said injury the defendant has transacted and does now transact such business, and continuously from said date the defendant has had and now has such place of business, and continuously
9 from said date has had and now has such agent, all within the District of Columbia, as in contemplation of the statute in such case made and provided, bring the defendant, upon service of the summons as herein already done, within the jurisdiction of this court.

That the defendant at the time of the injury to the plaintiff was and has been ever since engaged in general railroad business in the District of Columbia, employing a general agent, a passenger agent, and traffic manager in said District, and, in addition to these, the president of defendant's corporation has his residence in the District of Columbia.

That at the time of the injury to the plaintiff and at the time of the service of the writ in this cause the defendant, in addition to other business, was engaged in carrying the U. S. mail from within the District of Columbia to various points in the State of Virginia; that on said date, viz., the date of the injury, they received certain mail matter aboard their car and received the plaintiff, who was in charge of the same and whom by statute therefore they were required to receive without compensation, both at 6th & B streets N. W., in the city of Washington, in the District of Columbia, and it was directly in connection with the said business of carrying the mails, thus having its inception in the District of Columbia, that the plaintiff was hurt.

Wherefore he prays judgment and that the court here may take cognizance of this cause.

I. H. FORD,
Att'y for Plaintiff.

10 *Aff. of Plaintiff in Re Jurisdiction. Filed Aug. 9, 1883.*

In the Supreme Court of the District of Columbia, the — Day of ——, 1883.

JAMES M. T. GLEESON
vs.
THE VIRGINIA MIDLAND RAILROAD COMPANY. } At Law. No. 24593.

James M. T. Gleeson, being duly sworn, deposes and says that he is the plaintiff in the above-entitled cause; that at the date of the injury to him upon the defendant's road the defendant was engaged, and has been ever since, in carrying the U. S. mail from within the District of Columbia to various points on their said road in the State of Virginia; that it was while officially in charge of the mail re-

ceived by defendant in the District of Columbia, where he also was received, that he suffered the injury complained of in the declaration in this cause.

That the defendant at that time did and *have* continuously since done and now do a large business in the conveyance of passengers from within the District of Columbia to various points south, running solid trains of *their* own cars from the depot located at the corner of 6th & B streets N. W., in the city of Washington, in the District of Columbia; that the defendant has and has had for several years a principal place of business, advertised and opened to
11 the public, at the N. W. corner of 6th street and Penn. avenue N. W., in said city and district; that the *plaintiff* during all the time named has had and now has a general agent, a passenger agent, and a traffic manager (and its president resides) in said District, and that by arrangement with the Washington and Alexandria Railroad Co. the defendant receives freight and does a business of shipping merchandise from within the District of Columbia to various points south.

JAMES M. T. GLEESON.

Subscribed and sworn to before me this 9th day of August, 1883.

THOMAS W. SORAN,
Notary Public. [SEAL.]

Motion for Leave to Withdraw Replication. Filed Nov. 2, 1883.

In the Supreme Court of the District of Columbia, the 2d Day of November, 1883.

JAMES M. T. GLEESON
vs.
THE VIRGINIA MIDLAND RAILROAD COMPANY, Defendant. } At Law. No. 24593.

Now comes the plaintiff, by I. H. Ford, his attorney, and asks leave of court to withdraw his replication filed herein on the 9th day of Aug., 1883.

I. H. FORD,
Attorney for Plaintiff.

12 *Motion to Strike Out the Plea to the Jurisdiction. Filed Nov.* 2, 1883.

In the Supreme Court of the District of Columbia, the 2d Day of November, 1883.

JAMES M. T. GLEESON, Plaintiff,
vs.
THE VIRGINIA MIDLAND RAILROAD COMPANY, Defendant. } At Law. No. 24593.

Now comes the plaintiff, by his attorney, I. H. Ford, and makes this his motion to the court to st-ike from the record the plea to the

jurisdiction, filed herein by the defendant's attorney on the 3d day of August, 1883, because the said plea does not well traverse any of the material allegations of the plaintiff's declaration; because the said plea does not set out such facts, if proved, as would defeat the plaintiff's right to trial in this court as is by statute given in such case; because the defendant's plea is uncertain, and because the same is null.

I. H. FORD,
Attorney for Plaintiff.

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the third Monday, it being the 15th day, of October, A. D. 1883.

13

MONDAY, *October 15th, A. D.* 1883.

By order of Arthur MacArthur, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

SATURDAY, *November 24th, A. D.* 1883.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

* * * * * * *

JAMES M. T. GLEESON, Pl'ff,
vs.
VIRGINIA MIDLAND R. R. Co., Def't. } At Law. No. 24593.

Upon hearing the plaintiff's motion for leave to withdraw the replication filed by him, said motion is hereby granted; and thereupon, on hearing the plaintiff's motion to strike out the plea — jurisdiction filed by the defendant, it is considered that said motion be, and the same is hereby, overruled; and, on motion, and with the consent of the plaintiff, leave is granted the defendant to amend his plea to the jurisdiction of the court and to file an affidavit thereto.

14

Demurrer to the Plea to the Jurisdiction. Filed Nov. 24, 1883.

[On margin in pencil:] Plea not filed.

In the Supreme Court of the District of Columbia, the 24th Day of November, 1883.

JAMES M. T. GLEESON, Pl't'ff,
vs.
THE VIRGINIA MIDLAND RAILROAD COMPANY, Def't. } At Law. No. 24593.

The plaintiff says the defendant's plea to the jurisdiction is bad in substance—

And for ground of demurrer says that the said plea is not responsive to the material allegations of the declaration, and does not traverse the same or set up sufficient matter of avoidance thereof.

I. H. FORD,
Att'y for Plaintiff.

15 *Defendant's Plea and Affidavit. Filed Dec.* 1, 1883.

In the Supreme Court of the District of Columbia.

JAMES M. T. GLEESON
vs.
VIRGINIA MIDLAND RAILWAY CO. } At Law. No. 24593.

And now comes the defendant, by its president, John S. Barbour, and says that the court ought not to have or take further cognizance of said action, because at the time of suing out and serving said writ that the defendant had no principal office or general place of business in the District of Columbia; that it had an office within said District and an agent therein for the sale of tickets to passengers and with such powers and duties as were incident thereto, and that the defendant has no line of railway extending within said District; that the alleged injury complained of occurred within the State of Virginia and had no relation or connection in anywise with the business done by the said defendant within the District of Columbia, and that the said agent of the said defendant within the District of Columbia, in the conduct of the business therein prosecuted by the said defendant, had no agency, duty, or power relating to the said complainant or his duties or presence upon said train of cars of the defendant out of which the said alleged injury resulted.

And this the defendant is ready to verify. Wherefore he
16 prays judgment whether this court can or will take further cognizance of the action aforesaid.

JOHN S. BARBOUR,
President of Virginia Midland Railway Company.

Now, this first day of December, personally appeared before me John S. Barbour, who, being duly sworn, says that he is president of Virginia Midland Railway Company, and that the above plea is true.

THOMAS W. SORAN,
Notary Public. [SEAL.]

SATURDAY, *December 1st, A. D.* 1883.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

* * * * * * *

JAMES M. T. GLEESON, Pl'ff,
vs.
THE VIRGINIA MIDLAND R. R. Co., Def't. } At Law. No. 24593.

Upon hearing the plaintiff's demurrer to the defendant's
17 plea to jurisdiction, it is considered that said demurrer be, and the same is hereby, sustained, and leave granted defendant to plead further in twenty days from this day.

Demurrer. Filed Dec. 12, 1883.

In the Supreme Court of the District of Columbia.

JAMES M. T. GLEESON, Pl'ff,
vs.
THE VIRGINIA MIDLAND RAILWAY COMPANY, Def't. } At Law. No. 24593.

The defendant says the declaration is bad in substance.

LINDEN KENT,
Attorney for Def't.

NOTE.—One of the matters of law intended to be argued is that the alleged negligence of the defendant set out in the declaration as the cause of action was not the proximate cause of the alleged injuries to the plaintiff thereinafter set forth in said declaration as resulting therefrom.

LINDEN KENT,
Att'y for Def't.

18 *Motion to Set Aside Demurrer. Filed Dec.* 21, 1883.

In the Supreme Court of the District of Columbia, the 21st Day of December, 1883.

JAMES M. T. GLEESON, Pl'ff,
vs.
THE VIRGINIA MIDLAND RAILROAD COMPANY, Def't. } At Law. No. 24593.

Now comes the plaintiff, by his attorney, I. H. Ford, and moves that the court do set aside the demurrer to the declaration filed herein by the defendant on the — day of December, 1883, because in connection with the said demurrer the defendant has failed to properly comply with the thirty-fourth rule of court.

I. H. FORD,
Att'y for Plaintiff.

And for ground of demurrer says that the said plea is not responsive to the material allegations of the declaration, and does not traverse the same or set up sufficient matter of avoidance thereof.

I. H. FORD,
Att'y for Plaintiff.

15 *Defendant's Plea and Affidavit. Filed Dec.* 1, 1883.

In the Supreme Court of the District of Columbia.

JAMES M. T. GLEESON
vs.
VIRGINIA MIDLAND RAILWAY CO. } At Law. No. 24593.

And now comes the defendant, by its president, John S. Barbour, and says that the court ought not to have or take further cognizance of said action, because at the time of suing out and serving said writ that the defendant had no principal office or general place of business in the District of Columbia; that it had an office within said District and an agent therein for the sale of tickets to passengers and with such powers and duties as were incident thereto, and that the defendant has no line of railway extending within said District; that the alleged injury complained of occurred within the State of Virginia and had no relation or connection in anywise with the business done by the said defendant within the District of Columbia, and that the said agent of the said defendant within the District of Columbia, in the conduct of the business therein prosecuted by the said defendant, had no agency, duty, or power relating to the said complainant or his duties or presence upon said train of cars of the defendant out of which the said alleged injury resulted.

And this the defendant is ready to verify. Wherefore he
16 prays judgment whether this court can or will take further cognizance of the action aforesaid.

JOHN S. BARBOUR,
President of Virginia Midland Railway Company.

Now, this first day of December, personally appeared before me John S. Barbour, who, being duly sworn, says that he is president of Virginia Midland Railway Company, and that the above plea is true.

THOMAS W. SORAN,
Notary Public. [SEAL.]

SATURDAY, *December 1st, A. D.* 1883.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

* * * * * * *

JAMES M. T. GLEESON, Pl'ff,
vs.
THE VIRGINIA MIDLAND R. R. Co., Def't. } At Law. No. 24593.

Upon hearing the plaintiff's demurrer to the defendant's
17 plea to jurisdiction, it is considered that said demurrer be, and the same is hereby, sustained, and leave granted defendant to plead further in twenty days from this day.

Demurrer. Filed Dec. 12, 1883.

In the Supreme Court of the District of Columbia.

JAMES M. T. GLEESON, Pl'ff,
vs.
THE VIRGINIA MIDLAND RAILWAY COMPANY, Def't. } At Law. No. 24593.

The defendant says the declaration is bad in substance.

LINDEN KENT,
Attorney for Def't.

NOTE.—One of the matters of law intended to be argued is that the alleged negligence of the defendant set out in the declaration as the cause of action was not the proximate cause of the alleged injuries to the plaintiff thereinafter set forth in said declaration as resulting therefrom.

LINDEN KENT,
Att'y for Def't.

18 *Motion to Set Aside Demurrer. Filed Dec.* 21, 1883.

In the Supreme Court of the District of Columbia, the 21st Day of December, 1883.

JAMES M. T. GLEESON, Pl'ff,
vs.
THE VIRGINIA MIDLAND RAILROAD COMPANY, Def't. } At Law. No. 24593.

Now comes the plaintiff, by his attorney, I. H. Ford, and moves that the court do set aside the demurrer to the declaration filed herein by the defendant on the — day of December, 1883, because in connection with the said demurrer the defendant has failed to properly comply with the thirty-fourth rule of court.

I. H. FORD,
Att'y for Plaintiff.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the fourth Monday, it being the 28th day, of January, A. D. 1884.

MONDAY, *January 28th, A. D.* 1884.

By order of Alexander B. Hagner, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

19 SATURDAY, *February 2d, A. D.* 1884.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

JAMES M. T. GLEESON, Pl'ff,
vs.
THE VIRGINIA MIDLAND R. R. Co., Def't. } At Law. No. 24593.

Upon hearing the plaintiff's motion to strike out the defendant's demurrer and for judgment, it is considered that said motion be, and the same is hereby, overruled.

Joinder in Demurrer. Filed Apr. 26, 1884.

In the Supreme Court of the District of Columbia, the 26th Day of April, 1884.

JAMES M. T. GLEESON, Plaintiff,
vs.
THE VIRGINIA MIDLAND RAILROAD, Def't. } At Law. No. 24593.

The plaintiff says that the declaration is good in substance.

I. H. FORD,
Att'y for Plaintiff.

20 *Order for Placing Cause on the Calendar. Filed Apr.* 26, 1884.

In the Supreme Court of the District of Columbia, the 26th Day of April, 1884.

JAMES M. T. GLEESON
vs.
THE VIRGINIA MIDLAND RAILROAD Co. } At Law. No. 24593.

The clerk of said court will please place the above-entitled cause on the calendar of the May term for hearing on demurrer.

I. H. FORD,
Attorney for Plaintiff.

Proceedings before the supreme court of the District of Columbia, holding special term at law and circuit court in and for said District, and designated by order passed in general term September 25th, A. D. 1885, as division No. 1, commencing on the third Monday, it being the nineteenth day, of October, A. D. 1885.

MONDAY, *October 19th, A. D.* 1885.

By order of Walter S. Cox, one of the justices of said court, presiding, the court is opened by proclamation of marshal, pursuant to rule of court.

* * * * * * *

21 SATURDAY, *December 19th, A. D.* 1885.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

JAMES M. T. GLEESON, Pl'ff,
vs.
VIRGINIA MIDLAND R. R. Co., Def't. } At Law. No. 24593. Cal. 391.

Upon hearing the defendant's demurrer to the plaintiff's declaration, it is considered that the said demurrer be, and the same is hereby, overruled and leave granted the defendant to plead further.

Plea. Filed Dec. 21, 1885.

In the Supreme Court of D. C.

JAS. M. T. GLEESON
vs.
THE VIRG. MID. R'Y CO. } At Law. No. 24593.

And now comes the said defendant and, for plea to the declaration in the above-entitled cause, says that it is not guilty in the manner and form as in the declaration alleged.

L. KENT,
Att'y for Def't.

22 *Replication. Filed Apr.* 10, 1886.

In the Supreme Court of the District of Columbia, the 10th Day of April, 1886.

GLEESON
vs.
THE VA. MID. R. R. Co. } No. 24593.

The plaintiff joins issue upon the defendant's plea, filed in the above-entitled cause December 24th, 1885.

I. H. FORD,
Att'y for Plaintiff.

Proceedings before the Supreme Court of the District of Columbia, holding a special term at law and circuit court in and for said District, commencing the fourth Monday, it being the 25th day, of January, A. D. 1886.

MONDAY, *January 25th, A. D.* 1886.

By order of Alexander B. Hagner, one of the justices of said court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

23 FRIDAY, *April 16th, A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

JAMES M. T. GLEESON, Pl't'ff,
vs.
THE VIRGINIA MIDLAND R. R. Co., Def't. } At Law. No. 24953. Cal. 278.

Now comes here as well the plaintiff, by his attorney, Mr. Ford, as the defendant, by its attorney, Mr. Kent, and a jury of good and lawful men of this District, to wit, Joseph F. Page, Thomas D. Singleton, Augustus Lepreux, Charles F. Adams, Dewitt Fowler, Theodore Scheckles, Tobias Talbert, George Prender, Thomas J. Harris, Richard Anderson, John C. Sincell, and John F. Lipphard, who, being duly sworn to try the issue above joined, after a partial hearing of the case are respited until the meeting of the court on Monday morning next.

MONDAY, *April 19th, A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

JAMES M. T. GLEESON, Pl'ff,
vs.
THE VIRGINIA MIDLAND R. R. Co., Def't. } At Law. No. 24593. Cal. 278.

Now again come here the parties aforesaid, in manner
24 aforesaid, and the same jury that was respited on Friday last, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

TUESDAY, *April 20th, A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

JAMES M. T. GLEESON, Pl't'ff,
vs.
THE VIRGINIA MIDLAND R. R. Co., Def't. } At Law. No. 24593. Cal. 278.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

WEDNESDAY, *April 21st, A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

25 JAMES M. T. GLEESON, Pl't'ff, *vs.* THE VIRGINIA MIDLAND R. R. Co., Def't. } At Law. No. 24593. Cal. 278.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who after the case is given them in charge, retire to their room to consider of their verdict, with permission if they agree during the adjournment of the court, after reducing their verdict to writing, signing, sealing, and delivering the same to their foreman, to separate until the meeting of the court to-morrow morning.

THURSDAY, *April 22d, A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

JAMES M. T. GLEESON, Pl't'ff, *vs.* THE VIRGINIA MIDLAND R. R. Co., Def't. } At Law. No. 24593. Cal. 278.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury return into court, and on their oath say they find said issues in favor of the defendant. Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff the costs of its defence, taxed at $—, and have execution thereof.

26 *Motion for New Trial. Filed Apr.* 26, 1886.

In the Supreme Court of the District of Columbia.

GLEESON *vs.* THE VIRGINIA MIDLAND RAILROAD COMPANY. } At Law. No. 24593.

Now comes the plaintiff and files this his motion for a new trial for the following reasons:

1. The verdict of the jury was against the evidence.
2. The verdict of the jury was not supported by the evidence.
3. For errors of the court in the admission and rejection of evidence.
4. For errors of the court in granting the prayers of the defendant and refusing to grant the prayers of the plaintiff, and in charging the jury.
5. On exceptions to the rulings of the court in granting the

prayers of the defendant and refusing to grant the prayers of the plaintiff, and in charging the jury.

ISAAC H. FORD,
FRANCIS MILLER,
Attorneys for Plaintiff.

27 FRIDAY, *May 7th, A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

JAMES M. GLEESON, Pl't'ff,
vs.
VIRGINIA MIDLAND R. R. Co., Def't. } At Law. No. 24593.

Upon hearing so much of the plaintiff's motion for a new trial as is addressed to the discretion of the court, it is considered that the same be, and is hereby, overruled.

Proceedings before the supreme court of the District of Columbia, holding a special term at law and circuit court in and for said District, commencing the second Monday, it being the tenth day, of May, A. D. 1886.

MONDAY, *May 10th, A. D.* 1886.

By order of Hon. Alexander B. Hagner, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

28 MONDAY, *June 7th, A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

JAMES M. T. GLEESON, Pl't'ff,
vs.
THE VIRGINIA MIDLAND R. R. Co., Def't. } At Law. No. 24593.

Now again comes here the plaintiff, by his said attorneys, and tenders to the court here his bill of exceptions to the rulings of the court on the trial of this case, and prays that they may be duly signed, sealed, and made a part of the record now for then, which is done accordingly.

Bill of Exceptions. Filed June 7, 1886.

In the Supreme Court of the District of Columbia.

JAMES M. T. GLEESON
vs.
THE VIRGINIA MIDLAND RAILWAY COMPANY. } At Law. No. 24593.

Be it remembered that upon the trial of this cause before Hon. Alexander B. Hagner, an associate justice of this court, and a

29 jury, duly empaneled, the plaintiff, to maintain the issues on his part joined, gave evidence tending to prove that he was in January, 1882, and had been for twelve or fourteen years prior to that date a railway postal clerk in the service of the United States Post Office Department, and that he was at the time mentioned head clerk on one of the postal cars of the said railroad company; that on the morning of Sunday, January 15, 1882, in the discharge of his duties, he started on a postal car of the defendant from the city of Washington to go to Danville, Virginia, which was the end of his route; that before reaching Charlottesville, Virginia, near Orange Court-House, the train on which he was was stopped by a land slide which obstructed the track of the defendant; that after three successive trains from Washington had arrived and had all been collected together at the land slide the mail of which the plaintiff had charge was transferred around the slide and a train was made up on the other side of it to transport the mail and passengers southward; that the said train started from Charlottesville for Lynchburg and Danville about half past seven p. m. and the accident occurred in the neighborhood of an hour after leaving Charlottesville, on Sunday night, and that the train ran (at a speed more rapid than usual, so much so as to be a subject of remark to those in the mail car) to a point about a half a mile beyond Faber's, a station on said railroad, where it ran into another land slide, throwing the locomotive off the track on the left side going south
30 and precipitating the tender upon the locomotive and the mail car upon the tender; that the scene of the accident was a cut made by said railroad fifteen or twenty feet in depth, and that the earth had slipped from the right side of the road going south and extended entirely across the track after the accident.

The plaintiff further gave evidence tending to prove that at the time of said accident he was properly engaged in the discharge of his duty as a railway postal clerk; that he was thrown violently forward by the force of the collision, striking against a stove and letter box, by which three of his ribs were broken, his head on the left side severely contused, and that he received other bruises and hurts.

That he was detained at the scene of the accident till the afternoon of Monday, the 16th, when he went on to Lynchburg to deliver the registered mail matter, which was in his special charge, and then returned to Washington, where he placed himself under the charge of a physician; that he was unable to attend to his duties for about thirty days; that his mental and physical health was very much impaired, so that he was unable to perform the duties imposed upon him as postal clerk, and that he finally lost his position as such in consequence of the accident complained of, and, moreover, was by said accident disqualified from attending to other business.

The plaintiff further offered evidence tending to prove that the engineer of the train was caught on the locomotive by the tender and so injured that he died in a very short time, and that the fireman was considerably injured.

31 The defendant, to support the issues on its part joined, gave evidence tending to prove that the train at the time of the accident was not running at more than its usual rate of speed and not more than 20 miles an hour; that the engineer and fireman were competent men and were in their proper places; that the fireman was on the lookout and saw nothing of the land slide looking forward from his seat, and that the engineer neither said nor did anything to indicate to witness that he saw it before the accident; and also gave other evidence which tended to prove that the land slide occurred contemporaneously with the passage of the train and was caused by the vibrations *proceeded* by the passing train shaking down the earth from the right side of the cut; that this land slide thus caused struck the passing train and caused the accident complained of; and evidence tending to prove that the track was in good condition and was properly constructed.

The defendant further gave evidence tending to prove that rain had fallen on the afternoon of Friday and the morning of Saturday, the 13th and 14th of January; that a train from the South had passed through this cut at about 7 o'clock on the morning of January 15th, conducted by the same engineer that was afterwards killed in the accident, and that a young man then about nineteen years old, sent out as a track-walker by the defendant, had walked along the track through this cut at about seven o'clock of the even-
32 ing of said day, or about two hours before the accident, and that there was no slide at that time, and that no land slide had occurred in that immediate vicinity for at least three years.

And thereupon the plaintiff offered evidence tending to prove that several land slides had occurred within one mile of the scene of the accident while he had been running on the defendant's road, one of them within two years of the time of the accident.

And, the testimony on both sides having closed, the plaintiff asked the court to instruct the jury as set forth in the following prayers, to wit:

I. The defendant, being the owenr of its road-bed as well as its cars, is bound to the same diligence and skill as to the construction of its road-bed as it is with reference to the construction and condition of its cars.

II. The jury are instructed that if the defendant, by its servants, undertook to convey the plaintiff on its railroad, and while so conveying him, through the negligence of the servants of the company then and there employed on said railroad, the accident occurred by which the plaintiff was injured, then the defendant is liable for the injury done to the plaintiff by said accident, although he was on their cars as a railway postal clerk and not as an ordinary passenger.

III. The defendant as a common carrier is responsible for injuries received by the plaintiff in the course of his transportation which might have been avoided or guarded against by the
33 exercise upon their part of extraordinary vigilance, aided by the highest skill, and this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of passengers. Its engagement was

that, as far as human care and foresight can go, it would transport with safety the plaintiff.

IV. If the jury find for the plaintiff, in estimating the damages they may consider the circumstances, condition in life, and pursuits of the plaintiff; the probable consequences of the injury as transitory or permanent, according to the evidence; the rate of his earnings previous to the injury and the consequent loss from inability to prosecute his calling, if they shall find the same; any physical injury or physical suffering, mental suffering, or mental impairment, if resulting from physical injury, and whatever they may fine to be the continuing effect of the injury and its probable effect in the future, provided they find such injuries and that they are the results of the accident complained of as a proximate cause.

Which said prayers the court granted. And thereupon, at the defendant's request, the court granted the four following prayers, to wit:

I. The burden of proof is on the plaintiff to show that the defendant was negligent, and that its negligence caused the injury.

II. The jury are instructed that the plaintiff, when he took the position of a postal clerk on the railroad, assumed the risk and hazard attached to the position, and if in the discharge of
34 his duties as such he was injured through the devices in and about the car in which he was riding, properly constructed for the purpose of transporting the mails, the railroad is not liable for such injury unless the same were caused by the negligent conduct of the company or its employees.

III. The court instructs the jury that, whilst a large degree of caution is exacted generally from railway companies in order to avert accidents, the caution applies only to those accidents which could be prevented or averted by human care and foresight and not to accidents occurring solely from the act of God. If they believe that the track and instruments of the defendant were in good order, its officers sufficient in number and competent, and that the accident did not result from any deficiency in any of these requirements, but from a slide of earth caused by recent rains, and that the agents and servants of the company had good reason to believe that there was no such obstruction in its track, and that they could not, by exercise of great care and diligence, have discovered it in time to avert the accident, then they should find for the defendant.

IV. If the jury believe from the evidence that the defendant's instruments, human and physical, were suitable and qualified for the business in which it was engaged; that the accident complained of was caused by the shaking down of earth which had been loosened by the recent rains, and that the earth was shaken down by the passing of this train, then the accident was not such an act of negligence for which the defendant would be responsible, and the jury should find for the defendant.

35 And the counsel for the plaintiff objected to the granting of the first of said prayers and asked the court to modify it by adding to it the words "but that the injury to the plaintiff upon the car of the defendant, if the plaintiff was in the exercise of ordi-

nary is *prima facie* evidence of the company's liability." But a fused so to modify the said prayer, and the plaintiff duly n y excepted to the granting of each one of said prayers w of the defendant and to the refusal of the court to modify the said first prayer as offered before the jury retired; which said exceptions were severally allowed and entered on the minutes of the justice trying the cause; and the counsel for the plaintiff prayed the court to sign and seal this his first bill of exceptions; which is accordingly done this 7th day of June, 1886, now for then.

A. B. HAGNER. [SEAL.]
Associate Justice.

36 MONDAY, *October* 4, 1886.

Proceedings before the supreme court of the District of Columbia, sitting in general term, commencing on the first Monday, fourth day, of October, 1886.

Present: Chief Justice Cartter and Justices Cox and Merrick.

* * * * * * *

MONDAY, *January* 3*d*, 1887.

Session resumed pursuant to adjournment.

Present, presiding: Chief Justice Cartter and Justices Cox and Merrick.

JAMES M. T. GLEESON
vs.
THE VIRGINIA MIDLAND RAILROAD COMPANY. } No. 24593. Law. Cal. 56.

Because upon argument of the plaintiff's motion for a new trial in this case it seems to the court here that there is no error in the record of the proceedings of the special term or in its judgment, it is considered that the judgment of the special term be, and it is hereby, affirmed; that the plaintiff's motion for a new trial be, and it is hereby, overruled, and that the defendant recover against the plaintiff the costs of the cause in this court and have execution thereof.

37 Filed July 26, 1887.

In the Supreme Court of the District of Columbia, the 26th Day of July, 1887.

JAMES M. T. GLEESON
vs.
THE VIRGINIA MIDLAND RAILROAD COMPANY. } No. 24593. In Error.

Know all men by these presents that we, James M. T. Gleeson and Charles Ford, as surety, are bound unto the above-named The Virginia Midland Railroad Company in the sum of two hundred dol-

lars, to be paid to the said The Virginia Midland Railroad Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 26th day of July, 1887.

Whereas the above-named James M. T. Gleeson has prosecuted his appeal to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named James M. T. Gleeson shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAMES M. T. GLEESON. [SEAL.]
CHARLES FORD. [SEAL.]

Sealed and delivered in presence of—
THOS. E. YOUNG.

Approved July 26th, 1887.
WM. M. MERRICK, *A. J.*

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between James M. T. Gleeson and The Virginia Midland Railroad Company, being No. 24593 at law, a manifest error hath happened, to the great damage of the said James M. T. Gleeson, as by his complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 26th day of July, in the year of our Lord 1887, and of the Independence of the United States the one hundred and twelfth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *To wit:*

To the Virginia Midland Railroad Company:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein James M. T. Gleeson is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness E. F. Bingham, chief justice of the said supreme court of the District of Columbia.

E. F. BINGHAM,
Chief Justice.

39 [Endorsed:] No. 24593. Law. James M. T. Gleeson *vs.* Virginia Midland Railroad Co. Writ of error and citation. Served copy of within writ and citation on Linden Kent, attorney of record, July 26, 1887. A. A. Wilson, marshal.

40 AUTHENTICATION OF RECORD.

Clerk's Certificate.

Clerk's office, supreme court of the District of Columbia.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 30 day of July, 1887.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By J. R. YOUNG,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 30th day of July, 1887.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing

certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 30th day of July, 1887.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

[Endorsed:] Authentication of record.

Endorsed on cover: District of Columbia supreme court. No. 287. James M. T. Gleeson, plaintiff in error, *vs.* The Virginia Midland Railroad Company. Filed October 27, 1887.

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1890.

JAMES M. T. GLEASON,
Plaintiff in Error,
vs.
THE VIRGINIA MIDLAND RAILROAD COMPANY.
No. 287.

Brief in behalf of the Plaintiff in Error.

ISAAC H. FORD,
GUION MILLER,
For the Plaintiffs in Error.

R. O. Polkinhorn, Printer.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1890.

JAMES M. T. GLEASON,
Plaintiff in Error,
vs.
THE VIRGINIA MIDLAND RAILROAD COMPANY.

No. 287.

Brief in behalf of the Plaintiff in Error.

STATEMENT OF THE CASE.

This case comes up on error from the decision of the General Term of the Supreme Court of the District of Columbia, overruling the motion of the Plaintiff for a new trial upon a bill of exceptions to the ruling of the Justice in Special Term upon the prayers of the defendant.

It is an action against the defendant for injuries received by the plaintiff, on the car of the defendant while in the discharge of his duty as a United States Mail Agent. The evidence necessary to the discussion of the questions of law raised by the exceptions will be found on pages 15 and 16 of the Record. From this it appears that the plaintiff, on Sunday morning, January 15, 1882, started on a postal car

of the defendant to go on his regular route from Washington to Danville, Va. Before reaching Charlottsville, Va., the train was stopped by a land slide which obstructed the tracks, and after considerable delay the mail was transferred to another train which left Charlottsville for Danville about half past seven p. m., and after a run of about an hour this train ran into another land slide, which threw the train from the track and seriously injured the plaintiff, who at the time was properly engaged in the discharge of his duty. The scene of the accident was a cut made by the Railroad Company, fifteen or twenty feet deep, and the earth had slipped from the right side across the track. The defendant gave evidence tending to show that the land slide occurred contemporaneously with the passage of the train, and that it was caused by the vibrations produced by this train in passing. The defendant also gave evidence tending to prove that rain had fallen on the afternoon of Friday and the morning of Saturday, the 13th and 14th of January. It also appeared that land slides had occurred in the immediate vicinity of the accident within two or three years of this time.

ARGUMENT.

The Justice, before whom the case was tried, properly instructed the jury that the defendant was not relieved from liability by the fact that the plaintiff was on its car in the discharge of his duty as a United States Mail Agent, as is shown by the following decisions in which this point is expressly passed upon.

Seybolt vs. *N. Y. L. E., &c., R. R. Co.*, 95 N. Y., 562.

Hammond vs. *N. E. R. R. Co.*, 6 South Carolina, 130.

Ills. Cent. R. R. Co. vs. *Crudup*, 63 Miss. 291.

Collett vs. *London and N. W. R. R. Co.*, 16 Ad. & El., (N S.) 984.

A Mail Agent is not a "free passenger" and is therefore entitled to the same protection as other passengers.

Grand Trunk, &c., R. R. vs. *Stevens*, 95 U. S. 655.

N. Y. C. R. R. Co. vs. *Lockwood*, 17 Wall. 357.

Steamboat New World vs. *King*, 16 Howard 469.

Blair vs. *The Erie R. R. Co.*, 66 N. Y., 313.

Yeomans vs. *Contra Costa, &c., R. R. Co.*, 44 Cal. 71.

The exceptions relied on are to the granting of the four prayers asked by the defendant and set forth on page 17 of the Record.

I.

The Court erred in refusing to modify the defendant's first prayer as requested by the plaintiff. This prayer was (R. pp. 17 and 18):

"The burden of proof is on the plaintiff to show that the defendant was negligent, and that its negligence caused the injury," and the plaintiff asked

the Court to modify this prayer by adding to it the words, "but that the injury to the plaintiff upon the car of the defendant, if the plaintiff was in the exercise of ordinary care, is *prima facie* evidence of the Company's liability."

That the occurrence of an injurious accident to a person riding in a railroad car under the circumstances of this case is *prima facie* evidence of negligence on the part of the company, and throws upon it the burden of proving that it was not guilty of any negligence, is certainly a reasonable rule of law. The passenger delivers himself up entirely to the care and control of the carrier; he knows and can know nothing of the condition of the track or the cars, and has no means of ascertaining the character of the company's employees. All these things are within the cognizance of the officers of the company, and they can at any time make proof of them.

In the case of *The New Jersey R. R., &c., Co.* vs. *Pollard*, 22 Wall., 341, the plaintiff was standing up in the car as it slowly entered the depot, and there was a concussion of the train, and the plaintiff was thrown back against the arm of the seat and injured her spine. Under these circumstances the following prayer, which was granted below, was held to correctly state the law upon the authority of the case of *Stokes* vs. *Saltonstall*, 13 Peters, 181:

> "That, while the plaintiff is bound to satisfy the jury that the injury was caused by the negligence of the defendant, if, from the evidence the jury are satisfied that the injury was occasioned while she was a passenger on Defendants' road, and that she was in the exercise of ordi-

> nary care, namely: that degree of care which may reasonably be expected from a person in her situation, this would be *prima facie* or presumptive evidence of defendants' liability, and the plaintiff would not be required to show by what particular acts of misconduct or negligence on the part of the defendant the injury was occasioned, that in such case as supposed above, the defendant company must show, the burden being upon it, that its whole duty was performed, and that the injury was unavoidable by human foresight; that the company was bound to use the best precautions and improvements in known practical use to secure the safety of its passengers, public policy and safety requiring that it be held to the greatest possible care and diligence."

In the case of *Seybolt* vs. *N. Y. and E., &c., R. R. Co.*, 95 N. Y., 562, the train left the track and the cause was left in some doubt by the testimony. At the close of the case, the defendant requested an instruction to the jury that "the burden of proof is on the plaintiff to establish the negligence of the defendant. If there is a reasonable doubt on the whole evidence as to the negligence of the defendant, the verdict should be for the defendant." *This was refused*, and on appeal the court says:

> "We think the court committed no error in refusing to charge as requested. * * * * When he (the plaintiff) has shown a situation which could not have been produced except by the operation of abnormal causes, the *onus* then rests upon the defendant to prove that the injury was caused without his fault."

The case of *P. & R. R. Co.* vs. *Anderson*, 94 Penn. St., 351, was one in many respects similar to this. A

passenger was injured by an accident caused by the washing away of an embankment during an unprecedented storm, and the court held, even in that case, that the occurrence of the accident was *prima facie* evidence of the carrier's negligence, and threw upon him the burden of disproving it.

In another case against the same company, the same court, when the accident was caused by a cow on the track, says:

> "On the part of the company the contract implies that they are provided with a safe and sufficient railroad to the point indicated; that their cars are staunch and roadworthy; that means have been taken beforehand to guard every apparent danger that may beset the passenger, and that the servants in charge are tried, sober, competent men. When, in performing this contract, they hurt a passenger, without fault of his, the law raises, *prima facie*, a presumption of negligence and throws on the company the *onus* of showing it did not exist."
>
> *Sullivan* vs. *P. & R. R. R. Co.*, 30 Penn. St. 239.

And again, in *Brehm* vs. *The Great Western R. R. Co.*, 34 Barb. (N. Y.), 256, a case similar to this, the court says:

> "In this case instead of carrying the plaintiff safely over its road as the defendant contracted to do, he is, with the entire train, plunged into a gulf of some forty feet in depth, and the track wholly submerged or swept away. The moment such a state of things was shown to exist, the presumption of negligence on the part of the defendant, necessarily arose, and it required evidence on the part of the defendant to overcome that presumption, and establish affir-

matively that no negligence existed on its part to which the accident could be attributed.

"The principle of law having thus been correctly laid down to guide the jury, it obviously became a question for them to decide, upon the whole evidence, whether the defendant had succeeded in removing the presumption of negligence arising from the circumstances of the case, and establishing clearly that the accident arose either from causes inexplicable and involving no responsibility on its part, or from the hidden forces of nature and the interposition of a superior power which no care, skill or precaution on its behalf could avert or control."

The authorities seem to be entirely harmonious on this subject.

Pittsburg, &c., R. R. Co. vs. *Pillow*, 76 Penna. St. 510;

P. C. & St. L. R. R. Co. vs. *Thompson*, 56 Ills., 138;

Central R. R. vs. *Freeman*, 75 Ga., 339;

Lemon vs. *Chanslor*, 68 Mo., 340;

Field vs. *Middlesex R. R. Co.* 109 Mass. 398;

B. & O. R. R. Co. vs. *Wightman*, 29 Grattan, (Va.) 444;

Yeomans vs. *Costa, &c., Co.*, 44 Cal., 71;

Angell on Carriers, § 569;

2d Greenleaf on Evidence, § 222;

But the court refused to modify the defendants' first prayer as requested, and thereby instructed the jury that the burden of proving that the tracks was obstructed by reason of the negligence of the defendant rested on the plaintiff. He was quietly and diligently engaged in the discharge of his duties one minute, and the next, he was disabled for all obser-

vation or enquiry as to the cause of his injury, and yet he is required to satisfy the jury that the accident arose from the neglect of the company. The accident proved that something *was out of order*, and when that was established it was for the defendant to show that it was not out of order through any neglect of its agents or employees.

Thomp. Car. Pass, 211, 218.

In no class of cases is the question of *prima facie* evidence of more vital importance than in cases of this character, where the plaintiff is under such great disadvantages in securing particular and specific evidence of negligence. Its importance is thus forcibly stated by Justice Story :

> "What is *prima facie* evidence of a fact? It is such as, in judgment of law, is sufficient to establish the fact; and if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence by which the liberty and estate of every citizen are guarded and supported."
>
> *Kelly* vs. *Jackson*, 6 Peters, 622.

Of the benefit of this rule the plaintiff was totally deprived by the ruling of the trial justice, and it is submitted that this error alone is sufficient to entitle him to a new trial.

II.

The second prayer to which exception was taken is as follows (R., p. 17):

> "The jury are instructed that the plaintiff, when he took the position of a postal clerk on the railroad, assumed the risk and hazard attached to the position, and if in the discharge of his duties as such he was injured through the devices in and about the car in which he was riding, properly constructed for the purpose of transporting the mails, the railroad is not liable for such injury, unless the same were caused by the negligent conduct of the company or its employees."

While this prayer may, strictly speaking, correctly state the law, there is not only no evidence in the case upon which to base it, but also it is so drawn as to mislead the jury. The statement that the plaintiff "assumed the risk and hazard attached to the position" of postal clerk, is in the highest degree calculated to make the jury believe that the defendant did not owe him the same degree of care and protection as is due to other passengers. And there is nowhere in the record, nor in the case, any evidence tending to show that anything connected with his position, as such, contributed to his injury.

The instruction should not, therefore, have been allowed to go to the jury.

III.

The defendant's third prayer, which was granted, and to which exception was taken, is as follows: (R., p. 17.)

> "The court instructs the jury that whilst a high degree of caution is expected generally from railway companies in order to avert accident, the caution applies only to those accidents which could be prevented or averted by human care and foresight, and not to accidents occurring solely from the act of God. If they believe that the track and instruments of the defendant were in good order, its officers sufficient in number and competent, and that the accident did not result from any deficiency in these requirements, but from a slide of earth caused by recent rains, and that the agents and servants of the company had good reason to believe that there was no such obstruction in its track, and that they could not, by the exercise of great care and diligence, have discovered it in time to avert the accident, then they should find for the defendant."

This instruction contained three errors.

(*a*) In that it assumes that the accident was caused by an "act of God," in the sense in which the term is technically used.

(*b*) In not holding the defendant company responsible for the condition of the sides of the cut made by it in the construction of the road, the giving way of which caused the accident.

(*c*) In not correctly stating the degree of care and diligence required of carriers of passengers.

(*a*)

The facts of this case do not disclose an "act of God" as the cause of the injury.

The proof offered by the plaintiff certainly does not show such a cause. It does not even show that there had been a rain. It merely shows that the accident was caused by the train running into a landslide, which threw it from the track. Such an accident clearly could not be presumed to have resulted from the "act of God." The *defendant's evidence* establishes the fact that "rain had fallen on the afternoon of Friday and the morning of Saturday, the 13th and 14th of January." The accident occurred Sunday night, January 15th, about thirty-six hours later. It was an ordinary rain, such as might be expected at any time. It was merely a common manifestation of nature. Something within the everyday experience of men. An occurrence of which ever one is bound to take notice. A force that is constantly at work. A danger, if you please, but one we all must anticipate and guard against. There was no element of sudden emergency. There was no force which might not easily have been resisted by human agencies. There was neither a sudden nor extraordinary flood or freshet, nor is there any evidence of frost.

Moreover, the rain in this case could in no wise be considered the immediate or proximate cause of the accident. The track being covered with earth, which had fallen from the sides of the cut, was the immediate cause. The action of the rain which had fallen nearly two days before, and which may have tended to loosen the earth, was certainly too far re-

moved from the accident to be the proximate cause. Then, too, the cut was made by men, the agents of the defendant. The original surface of the hill with the grass and roots which had added to its stability, had been cut away leaving the earth exposed to the action of the elements. The defendant knew this and was bound to guard against it.

This immediate vicinity had been, in the past, subject to land-slides (R. p. 16), and the train upon which the plaintiff was riding had that evening been delayed by a land-slide, at another point on the road. (R. p. 15.) In addition to this, though running at night, and with the knowledge of this danger, the speed of the train does not appear to have been slackened, even according to the defendant's testimony (R. p. 15), while the plaintiff's evidence is to the effect that the train was running "at a speed more rapid than usual, so much so as to be a subject of remark to those in the mail car." (R. p. 15.)

That these facts do not constitute an "act of God" within the meaning of the exemption is, we submit, abundantly shown by the following quotations and decisions.

> "The exception of the "act of God" has, by the decision of the Courts, been restricted to such narrow limits, as scarcely to amount to any relief to Carriers. It is in reality limited to accidents which come from a force superior to all human agencies, either in their production or resistance."
>
> 2 *Redfield on Railways* 6, § 167.

Lord Mansfield, in *Forward* vs. *Pittard* says:

"What is an "act of God?" I consider it to be something in opposition to the act of man, for everything is the "act of God" that happens by His permission; everything, by His knowledge. But to prevent litigation, collusion and the necessity of going into circumstances that can't be unravelled, the law presumes against the Carrier unless he shows it was done * * * * * by such an act as could not happen by the intervention of man, as storms, lightnings and tempests."

"The 'act of God" seems to involve some notion of an accident from natural causes, impossible to be forseen, and therefore impossible to be guarded against. Such are the instances of storms, lightnings and tempests enumerated by Lord Mansfield in 1 T. R., 33."

Ewart vs. *Street*, 2 Bailey (S. C.), 162.

"The loss must be occasioned immediately and directly, and not consequentially by the 'act of God.'"

Bset, C. J., in *Riley* vs. *Home*, 5 Bing., 220, says:

"From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the 'act of God,' and the King's enemies."

In *Moffat* vs. *Strong*, 10 Johns., 11, Chief Justice KENT says:

"The only real point in the case was a question of fact submitted to the jury, viz., whether the loss of the scow was to be attributed to that inevitable necessity not arising from the intervention of man, which human prudence could not have avoided, and which is considered as the 'act of God.'

"The well-settled legal import of these phrases (The 'act of God,' or inevitable accident) limits inevitable accidents to such as may be produced by physical causes which are irresistible, which human foresight and prudence cannot anticipate, nor human skill and diligence prevent, such as loss by lightning, storms, inundations and earthquakes, and the unknown dangers to navigation, which are suddenly produced by their violence."

McCall vs. *Brock*, 5 Strobhart, (South Car), 124.

"In my opinion, the 'act of God,' unmixed with human agency or human negligence, are synonymous. * * * In thus laying down my views of the law, it is not my purpose to shift the *onus*, or to relieve carriers from the strict diligence required of them in the older authors. To render the excuse valid, not only must the carrier trace the loss or injury *immediately to the operations of nature*, *but he* must convince the jury that such loss or injury resulted from inevitable necessity, which no human prudence could foresee or prevent."

Steamboat Co. vs. *Barclay*, 30 Ala., 128.

In the case of *Transportation Co.* vs. *Thiers*, 4 Zabrieskie (N. J.), 797, a "violent storm," "itself strictly an act of God," caused a low tide, and thus the vessel struck against a projecting timber of the wharf below the water, the court says :

"The natural effect of the storm which occurred in this case and which was not sudden, but of the approach of which there was full warning, was, as all the witnesses testify, to produce a very low tide, and this effect, it was as much the duty of the carrier to guard against by all proper precautions as any other." * * * *

> "If, therefore, the loss arose exclusively from the violence of nature, the defendants are not liable. But if it were caused by that kind of force of the elements which could have been foreseen or prevented, or by the force of the elements combined with such act of man as could have been avoided, the defendants are liable."

In *Firth* vs. *The Bowling Iron Co.*, Law Reporter, 3 C. P. Division, 254, the defendant, who was bound to fence, maintained a wire rope fence. From long exposure the strands of wire rusted, decayed, and some of the pieces fell in the grass, and the cow of the plaintiff took them up while feeding, in consequence of which she died. In sustaining an action for the value of the cow, the court says:

> "Even without notice (of defect) this action seems to us, upon the facts of the case to be maintainable. The nature of the wire was known to the defendants; that parts of it should fall on the plaintiff's land was a natural result of the decay of the wire, and the pieces being hidden in the grass were naturally liable to be swallowed by the cattle grazing there."

In this case, too, it will be noticed that the defendant was under no special contract duty to the plaintiff.

> "*If a storm, though unusual, is not unprecedented, it does not come within the category of the 'act of God.'*"

Dixon vs. *Met. B. W.*, 7 Q. B. D., 418.

Our contention is most strongly sustained by the case of the *Great Western Ry.* vs. *Braid*, 1 Moore, P. C., (N. S.) 101, which is in nearly every particu-

lar the same as this. The accident occurred about 2 a. m., and from six o'clock the preceding evening, there had been an extraordinary storm, and the embankment was carried away; loaded trains had passed safely during the night, and at ten minutes past one that morning, and all appeared safe and there was nothing to attract attention. The road bed had been used four years without accident and was inspected daily. A verdict for the plaintiff was affirmed, Lord Chemsford saying:

> "The railroad company ought to have constructed their works in such a manner as to be capable of resisting all the violence of weather which in the climate of Canada might be expected, though perhaps rarely, to occur." "In the whole of the evidence there is nothing more proved than that the night was one of unusual severity, but there is no proof that nothing similar had been experienced before, nor is there anything to lead to the conclusion that it was at all improbable that such a storm might at any time occur." "It is evident that the embankment was insufficiently provided with means of resisting the storm, which though of unusual violence, was not of such a character as might not reasonably have been anticipated, and which, therefore, ought to have been provided against by all reasonable and prudent precautions."

See also *P. & R. R. R. Co.* vs. *Anderson*, 94 Pa. St. 351;

Louisville, &c., R. R. Co. vs. *Thomson*, 5 West. Rep., 833;

Strouss vs. *Wabash, &c., R. R. Co.*, 17 Fed. Rep., 209;

Miller vs. *Navigation Co.*, 10 N. Y., 431;

Merritt vs. *Earle*, 31 Barb. (N. Y.) 43;

R. R. Co. vs. *Halloren*, 53 Tex., 46.

(*b.*)

The prayer entirely excludes the idea that the defendant might be responsible for allowing the sides of the cut to be in such a condition that an ordinary rain would cause a landslide, and also that negligence might be inferred from the fact that nearly two days had elapsed and the defect had not been remedied. Certainly it is as much the carrier's duty to see that the track is free from obstruction, as it is to see that the track itself is well laid and in place.

The learned editors (Hare and Wallace), of 8th American edition of Smith's Leading cases, p. 448, states the law on this subject thus:

> "The road should be protected, either by fences, or by the companies' servants, or in some way, from danger by those obstructions which prudence would suggest as likely otherwise to get upon it."

And again, on p. 449:

> "That a company is unable to provide sufficient tracks or other defences against danger, without impairing or entirely absorbing its capital and proving a dead loss to its stockholders, is hardly an answer to its legal liability. Under what obligation is a railway to make large dividends? Under what obligation is it *not* to preserve the life of travellers in its charge."
>
> "There can be no doubt that the carrier is bound to see that his track is kept clear of obstructions, as much as he is to see that his carriages are road worthy and his servants in charge tried, sober and competent men."
>
> *Sullivan* vs. *P. & R. R. R. Co.*, 30 Pa. St., 235.

The case of *Virginia Central R. R. Co.* vs. *Sanger*, 15 Grattan (Va.), 237, is one closely resembling this. Some rocks had been piled up alongside of the track for the purpose of ballast, and some of them got upon the track, causing the injury. In rending its opinion the Court says:

> "Combining in themselves the ownership as well of the road as of the cars and locomotives, they are bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and all the subsidiary arrangements necessary to the safety of the passengers.
>
> "And as accidents as frequently arise from obstructions on the track as perhaps from any other cause whatever, it would seem to follow obviously, that there is no one of the duties of a railroad company more clearly embraced within its warranty to carry their passengers safely, as far as human care and foresight will go, than the duty of employing the utmost care and diligence in guarding their road against such obstructions."

See also *McElroy* vs. *N. & L. R. R. Co.*, 4 Cushing, 400.

Hutchinson on Com. Car., p. 524.

> "The sudden giving way of part of the structure is evidence of negligence in its construction."

Shearman and Redfield on Negligence § 448.

This doctrine is also strongly expressed in the case of *Kearney* vs. *London, &c., R. R. Co., Law Reports*, 6 Queen's Bench, 759. The plaintiff was injured by walking along the public highway, by a brick which

fell from the pier of the defendant's bridge. A train had just previously passed, and the counsel for the defendant submitted that there was no evidence of negligence. The court, in affirming the decision in L. R. 5 Q. B. 411, (see opinion of Lush J., in that Report, page 415), says:

> "There can be no doubt that it was the duty of the defendants, who had built the bridge over the highway, to take such care that where danger can be reasonably avoided, the safety of the public using the highway, should be provided for. The question, therefore is, whether there was any evidence of negligence on the part of the defendants; and by that we all understand such an amount of evidence as to fairly and reasonably support the finding of the jury. The Lord Chief Justice in his judgment in the court below said *res ipsa loquitur*, and I cannot do better than to refer to that judgment. It appears without contradiction that a brick fell out of a pier of the bridge without any assignable cause except the slight vibration caused by a passing train. This we think is not only evidence, but *conclusive evidence*, that it was loose; for otherwise, so slight a vibration could not have struck it out of its place. * * * The bridge had been built two or three years, and it was the duty of the defendants from time to time to inspect the bridge and ascertain that the brickwork was in good order, and all the bricks well secured."

(*c.*)

The measure of diligence required of carriers of passengers is certainly not correctly stated. It is not sufficient that the company had "good reason to believe there was no obstruction." They should have

had *every reason.* They are required to *know.* "The rule which entitles municipal corporations to notice of defects has no application to railroad companies."

Worster vs. *Forty-second St. R'y Co.*, 50 N. Y. 203.

Nor could it relieve itself from liability by the "exercise of great care and diligence."

The carrier's contract is "That as far as human care and foresight can go, he will transport them safely."

Stokes vs. *Saltonstall*, 13 Peters, 191.
Story on Bailments, § 601.

The degree of diligence required of railroad companies when they place their passengers in the cars, entirely helpless and incapable of protecting themselves from injury, has frequently and forcibly been passed upon by this Court.

> "The carrier is required, as to passengers, to observe the *utmost caution characteristic of very careful, prudent men.* He is responsible for injuries received by passengers in the course of their transportation, which might have been avoided or guarded against by the exercise upon his part of *extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger.*"
>
> *Penn. R. R. Co.* vs. *Roy*, 102 U. S., 451.

In *P. & R., R. R. Co.* vs. *Derby*, 14 Howard, 468, this Court says:

> "When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that

> they be held to the greatest possible care and diligence. And whether the consideration for for such transportation be pecuniary or otherwise the personal safety of the passengers should not be left to the spors of chance or the negligence of careless agents. Any negligence in such cases may well deserve the name of 'gross.'"

Cited and reaffrmed in *The Steamboat New World* vs. *King*, 16 Howard, 474, and in *Indianapolis, &c. R. R. Co.* vs. *Horst*, 93 U. S., 291:

> "If the degree of care and watchfulness is to be in proportion to the importance of the business and the degree of peril incurred, it is scarcely possible to express the extreme severity of care and diligence which should be required in the conduct of passenger trains upon railways."

Redfield on Rail., § 149, note 5;
Railroad Co. vs. *Aspell*, 23 Penn., 147.

For an exhaustive treatment of this subject, see *Taylor* vs. *R. R. Co.*, 48 N. H., 312-318.

There is no evidence in the case that the sides of the cut had ever been examined since its construction. They had evidently been in an unsafe condition, at least since the rain, and they certainly had not been properly constructed or maintained, for otherwise they would have been able to withstand the action of an ordinary rain.

We confidently assert that no decision can be found in the books holding that a railroad company is not bound to guard against ordinary rains. In all cases where the company has been relieved from responsibilty the proof has disclosed *a sudden and extraordinary freshet or flood*,.

We submit, therefore, that there was manifest error committed by the trial justice in giving the defendant's third prayer to the jury.

IV.

The fourth prayer of the defendant, to which exception was taken is, as follows: (R., p. 17.)

> "If the jury believe from the evidence that the defendant's instruments, human and physical, were suitable and qualified for the business in which it was engaged; that the accident complained of was caused by the shaking down of the earth which had been loosened by the recent rains, and that the earth was shaken down by the passing of this train, then the accident was not such an act of negligence for which the defendant would be responsible, and the jury should find for the defendant."

Besides being subject to the objections raised to preceding prayer, this one contains a still greater error. In it the court tells the jury that if a train, in its passage through a cut, shakes down the earth from the sides of the cut, no enquiry whatever can be made by them as to whether there was negligence on the part of the company with reference to such land slide. That if they believe that the accident was caused by the earth shaken down by this train while passing, they could stop right there, and should render a verdict for the defendant. Might not the "utmost precaution and extraordinary diligence," (102 U. S., 451), have discovered that this bank was liable thus to fall, and would it not have been pos-

sible by "the utmost care and diligence," (Story on Bailments, § 601) to have prevented the accident?

See *Va. Cent. R. R. Co.* vs. *Sanger*, 15 Grattan, 239–40.

Surely the accident and the land slide were *some* evidence *tending* to prove negligence, and when there is *any* evidence of negligence, it raises a question of fact that must be decided by the *Jury* and not by the Court.

R. R. Co. vs. *Stout*, 17 Wall, 657.

Milwaukee National Bank vs. *City Bank*, 103 U. S. 668.

3 *Lawson's Rights and Remedies*, § 1215.

But the Court below took this question from the Jury and declared, as *matter of law*, that there could be no negligence in such a case.

In rendering the decision of the Court in General Term, [The opinion was not filed, and therefore does not appear in the Record, but is appended to this brief] Justice Cox, in effect, admits the correctness of our contention, in regard to the *prima facie* case and degree of care, as applicable to ordinary cases, but he holds that the facts disclose an "act of God," as the cause of the accident, and that therefore the rules of law are different.

In support of this position he cites the case of *R. R. Co.* vs. *Keeves*, 10 Wall. 176. In that case the damage was shown to have resulted from the immediate "act of God." "The testimony in th ecase, wholly uncontradicted, shows one of the *most sudden, violent and extraordinary floods* ever known in that part of the country." Moreover, that case only de-

cides that where the "act of God" causes the damage, the fact that the carrier is behind time does not render him liable, as such a damage is not the natural and proximate result of such lateness. The rule that where the loss is shown, the burden is then upon the carrier to bring it within one of the excepted perils, such as the "act of God" or the public enemy, is left untouched and in full force.

The Niagara vs. *Cordes*, 21 How., 7.

So, too, in the cases of *Denny* vs. *R. R. Co.*, 13 Gray, 481; *Morrison* vs. *Davis*, 20 Pa. St., 171; *McClary* vs. *R. R. Co.*, 3 Neb., 44, and *Gillespie* vs. *R. R. Co.*, 6 Mo. App., 554, cited in the same opinion, the damage was acknowledged to have been caused, poximately, by an "act of God," and the carrier was only attempted to be held liable because of some negligence by which he had brought or left the goods within the influence of the "act of God." The questions of the *prima facie* case, and the *existence* of an "act of God" do not enter into any of these cases.

If, indeed, the question were an open one in this Court, the correctness of the doctrine advanced in these cases might be seriously questioned, for it has been expressly repudiated in many of the States, as will appear from the following cases:

Read vs. *Spaulding*, 30 N. Y., 630.
Bostwick vs. *R. R. Co.*, 45 N. Y., 712.
Condict vs. *R. R. Co.*, 54 N. Y., 500.
Durson vs. *R. R. Co.*, 3 Lans., 265.
Pruitt vs. *R. R. Co.*, 62 Mo., 527, 80
Michigan Cent. R.R.Co. vs. *Curtis*, &c., *Ills.*, 324.

In any event, however, this case does not present a similar set of facts. This relates to an injury to a passenger; they relate to damage to goods. In them the "act of God" was admitted; in this it is denied, and is not proved.

Moreover, railroad companies have, as has been shown, been held liable for accidents almost identical in character to that which caused the injury complained of in this case, and in one, at least, of these (94 Pa. St., 351), the cases of *R. R. Co.* vs. *Reeves*, and *Morrison* vs. *Davis*, *&c.*, were cited by the defendant, and noticed by the Court.

R. R. Co. vs. *Anderson*, 94 Pa. St., 351;
Great Western R. R. Co. vs. *Baird*, 1st Moore, P. C. (N. S.), 101;
R. R. Co. vs. *Thompson*, 5 Western Reporter, 833;
R. R. Co. vs. *Sanger*, 15 Grattan, 238.
Brehm vs. *R. R. Co.*, 34 Barb., 256.

We respectfully submit, therefore, that the plaintiff should be granted a new trial.

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Mr. Justice Cox delivered the opinion of the court.

This was an action to recover damages for an injury sustained by the plaintiff on the cars of the defendant, under the following circumstances. The plaintiff was a postal clerk in the service of the United States Post Office Department, and was, at the time of the occurences hereafter mentioned, head clerk on one of the postal cars of the defendant railroad company. On Sunday, January 15, 1882, he started on a postal car of the defendant from the city of Washington to go to Danville, Virginia, which was the end of the route. The train left Charlottesville for Lynchburgh and Danville about 7:30 p. m. In about an hour and a half after leaving Charlottesville, the train ran into a land slide, which threw the locomotive off the track. The scene of the accident was a cut, made by said railroad company, fifteen or twenty feet deep, and the earth had slipped from the right side entirely across the track. The plaintiff, by force of the collision, had several ribs broken, and was severely contused and suffered other consequential injuries.

This is all of the case that it is necessary to recite for the purpose of considering the questions of law involved.

The case went to the jury under several instructions and a charge from the court, and a verdict was rendered for the defendant. It comes before us upon a motion for a new trial upon bills of exception.

The first important question is, what was the immediate cause of the accident? The slide was not from an embankment constructed by the defendant company, but from a natural hill left by the defendan, when they excavated for their road bed. The earth was thrown upon the track by no immediate human agency, but by the forces of nature, occult,

unforseen, and unexplained even at this time, except by conjecture. It was clearly, therefore, the act of God. The defendant may have been guilty of neglect in not providing against such a casualty, either by a different construction of their road or by a better inspection, or otherwise. But if so, the most that can be said is, that their neglect contributed *remotely* to the result. Still, it remains true, that the direct, immediate and proximate cause of the accident was an act of God. The rulings of the court are to be read in refefence to this prominent and important fact in the case.

At the trial, the defendant asked the court to instruct the jury "that the burden of proof is on the plaintiff to show that the defendant was negligent, and that its negligence caused the injury." The plaintiff's counsel then asked the court to modify this instruction as follows:

> "But that the injury to the plaintiff upon the car of the defendant, if the plaintiff was in the exercise of ordinary care, is *prima facie* evidence of the company's liability,"

—which was refused.

This raises the important questions as to the presumption of law growing out of an accident of this kind, and on whom is the burden of proof.

The third instruction was that:

> "If the jury believe that the track and instruments of the defendant were in good order, its officers sufficient in number and competent, and that the accident did not result from any deficiency in these requirements, but from a slide of earth caused by recent rains; and that the agents and servants of the company had good reason to believe that there was no such obstruction in its track, and that they could not by the exercise of great care and diligence have discovered it in time to avert the accident, then the should find for the defendant."

This instruction, which was excepted to, presents the question, what is the the rule of diligence in guarding against accidents of the description mentioned?

It is expedient to consider the two questions together. Under some circumstances it is undoubtedly true that the mere happening of an accident to a passenger on a railroad, where the passenger himself has been duly careful, raises a presumption that it was due to the negligence of the carrier. If the accident results from a defective arrangement of the time-table, as in case of a collision of trains, both occupying the same track at the same time and going in opposite directions, or from the breakage of an axle or wheel, or the failure of a break to work properly, or the displacement of a rail, or, in other words, from a defect in any apparatus, construction or service under the complete control of the defendant, then, according to the current of authorities, the presumption of the negligence on the part of the defendant does arise. But it is unsafe to go further that this. See Le Barron V. R. R. Co., 11 Allen, 316.

There is another class of cases in which it is held by the highest authorities that the rule does not apply. If, for example, even upon a *prima facie* showing of neglect, by the plaintiff's proof, the defendant shows that the accident was caused immediately by the act of God, the burden then is shifted to the plaintiff, of showing that the defendant's negligence brought about or contributed to the operation of the agency in question. And still further, if the plaintiff, by his own proof, shows that the accident was due to an act of God, the presumption of neglect on the part of the defendant does not arise, and the burden lies upon the plaintiff, all the time, of showing actual negligence on the part of the defendant.

In this connection, another rule is also recognized by the same authorities, and that is, that a different rule of diligence applies where the accident results

from any defect in what is under the control of the carrier from that which governs in cases where it is due to the forces of nature.

The carrier is bound to the highest degree of diligence and care in reference to his machinery, vehicles and plant. But the degree of care and diligence to be exercised in providing against casualties from the *vis major*, or act of God is only ordinary, and not more than that which persons of ordinary prudence are expected to exercise.

One of the first cases in which these questions arose is that of *Morrison* vs. *Davis & Co.*, 20 Penn. State Reports, 171. In that case it appeared that the plaintiff's goods were on the canal boat of the defendant which was wrecked by reason of an extraordinary flood; that the boat would have passed the point where the accident occurred before the flood came, and would have arrived safely, but that the defendant had a lame horse for towing the boat, and was for this cause unable to make the usual time. There the court held that the immediate cause of the injury was the act of God, and the defendant's neglect, in not providing proper force for towing the boat, contributed only remotely to the result. They say:

> "Now there is nothing in the policy of the law relating to common carriers that calls for any diifierent rule as to consequential damages to be applied to them. They are answerable for the ordinary and proximate consequences of their negligence, and not for those that are remote and extraordinary. And this liability includes all those consequences which may have arisen from the neglect to make provision for those dangers which ordinary skill and foresight is bound to anticipate. *Though they are held to the strictest care as to the sufficiency of their ship and other vehicles and the custody of the goods, yet no greater foresight of extraordinary perils is expected of them than of other men, and no greater penalty is visited for its failure.*"

This case therefore recognizes the rule of diligence and foresight in reference to extraordinary perils or acts of God, as no stricter in the case of the common carrier than in the case of other persons.

This case is cited with approbation in *Denny* v. *New York Central R. R. Co.*, 13 Gray, 481, and both cases are cited with approbation by the Supreme Court of the United States in the case of *Railroad Company* v. *Reeves*, 10 Wall., 176. That was a case in which tobacco, owned by the plaintiff and shipped on the cars of the defendant, was injured by a freshet. The ground of the claim against the defendant was delay in transporting the goods without which they would not have been injured. The court says:

> "We will notice one of the rejected instructions which was as prayed in these words: 'When the damage is shown to have resulted from the immediate act of God, such as a sudden and extraordinary flood, the carrier will be exempt from liability unless *the plaintiff shall prove* that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so *must be proven by the plaintiff or must appear in the facts of the case.*' It is hard to see how the soundness of this proposition can be made clearer than by its bare statement. A common carrier assumes all risks except those caused by the acts of God and the public enemy. One of the instances always mentioned by the elementary writers, of loss by the act of God, is the case of loss by flood and storm. Now when it is shown that the damage resulted from this cause immediately, he is excused. What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the overpowering cause, it is charged that

his negligence contributed to the loss, the proof of this must come from those who assert or rely on it. * * * The second instruction given by the court says that 'If while the cars were so standing at Chattanooga they were submerged by a freshet which no human care, skill or prudence could have avoided, then the defendant would not be held liable. But if the cars were brought within the influence of the freshet by an act of the defendant, and if the defendant or his agent had not so acted the loss would not have occurred, then it was not the act of God, and the defendant would be liable.'

"The fifth instruction given also tells the jury that 'if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for the plaintiff.' In contrast with the stringent ruling here stated, and as expressive of our view of the law on this point, we cite the decisions by courts of the first respectability in this country."

The court then refers to the cases already mentioned of *Morrison* v. *Davis & Co.* and *Denny* v. *New York Central R. R. Co.*, and adds :

"Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the court's charge in this case."

It is true that these cases relate to carriers of freight. But no reasons are perceived why the same rules should not apply to the carriers of passengers ; and, in fact, the law as stated above is so applied in the case of *Gillispie* v. *St. Louis, Kansas City, &c., R. R. Co.*, 6 Mo., App., 554.

That was the case of a road-bed washed out from under the ties by extraordinary flood, in consequence of which the road gave way and an injury resulted.

The court said, "Here it came out, as a part of the

plaintiff's case, that the rainstorm was one of extraordinary violence and seemingly adequate to produce the injury. The defendant might have rested on the plaintiff's evidence and have contended before the jury that the sole efficient cause of the injury was the sudden and extraordinary storm."

After citing the evidence as to the storm they proceed:

> "Here the plaintiff could not ignore this and similar evidence, and thus assume that, like a plaintiff who proves merely such an accident as tends to show neglect in a carrier, she had cast the burden on the defendant. The burden lay on her to show that, notwithstanding the operation of the act of God in the case, the neglect of the defendant caused the injury or actively cooperated with the act of God to produce it. Even if it could be stated without qualification, which it cannot, that in an action against a carrier by a passenger, mere proof of the accident and injury shifts the burden, that rule would not apply to a case where the plaintiff's own evidence shows the act of God as an operating and possibly sufficient cause. See *R. R. Co.* v. *Reeves*, 10 Wall., 190; *Livezy* v. *Phila.*, 64 Pa. St.; *Le Barron* v. *Ferry Co.*, 11 Allen, 316."

Again:

> "The second error in the instruction quoted runs through the third and fourth instructions given. By these instructions the difference between the responsibility of the carrier as against the act of God, and as against those perils which the carrier is answerable for, is ignored. The carrier is held by the instructions to the highest degree of foresight and care as against an act of God. But the law imposes on him no such liability. It has been truly said there is hardly any act of God, in a legal sense, which an exhaustive circumspection might not antici-

pate and supposable diligence not avert the consequence of. So that that doctrine would end in making the carrier responsible for acts of God when by law the passenger, and not the carrier, the risk. It has been said that, to make the rule a working rule and give to the carrier the practical benefit of the exemption which the law allows him, he must be held, in preventing or averting the effect of the act of God, only to such foresight and care as an ordinarily prudent person or company in the same business would use under all the circumstances of the case. See also 43 Amer. Dec., note 364; citing above case and *McClary* vs. *Sioux City & P. R. R. Co.*, 3 Neb., 44."

By these cases the rule is clearly laid down that where the injury is in the first instance shown to have been occasioned by the act of God, no presumption of negligence on the part of the defendant arises, but the burden is upon the plaintiff of proving such negligence. And further, that the only measure of diligence required on the part of the defendant to provide against such casualties is the ordinary care and prudence that other people exercise. If the rule were as stringent as is claimed on the part of the plaintiff, that is, that the defendant must exercise extreme diligence to avert all accidents, there is no limit to the expense and trouble which they would have to assume. It would be necessary, for example, to send a pilot-engine in advance of every passenger train; to have every mile and fraction of a mile of the road policed and guarded by watchmen in sight of each other so that no possible casualty could occur without the knowledge of the defendant's agents in time to avert it—precautions which would exhaust the resources of any railroad company in the country.

This being the law, as we understand it, the plaintiff had no right to ask the court to instruct the jury to modify the first instructions given for the defend-

ant by saying that the injury of itself was *prima facie* evidence of the defendant's liability. Neither can he complain that, in the third instruction, the court did not assert the rule that the defendant should have exercised *extreme* diligence, instead of great care and diligence, in order to avert the accident.

Another subject of complaint is found in the fourth instruction given at the instance of the defendant. The court say:

> "If the jury believe from the evidence that the defendant's instruments, human and physical, were suitable and qualified for the business in which it was engaged; that the accident complained of was caused by the shaking down of earth which had been loosenened by the recent rains, and that the earth was shaken down by the passing of this train, then the accident was not such an act of neglect for which the defendant would be responsible, and the jury should find for the defendant."

The former instructions contemplated the case of a slide occurring before the train reached the point of the accident. This one evidently looks to the other theory—that the slide occurred simultaneously with the arrival of the train at the point in question. The complaint as to this instruction is that it excludes any inquiry into the negligence of the defendant; that it instructs the jury that if such an accident happened they must find for the defendant, without allowing them to consider whether the neglect of the defendant contributed to the result.

Taken by itself, this instruction might bear that interpretation. But taken in connection with the other instruction and the charge, we think such interpretation entirely unfair. All that the court means to say is that if vibration caused by the train resulted in the loosening and falling of the earth, that alone is not an act of negligence for which the defendant

would be responsible, and that if that is all the negligence alleged or shown, the jury must find for the defendant.

In the previous instruction, which has just been referred to, and also still more fully in the charge, the question of the defendant's negligence is fully brought out and presented to the jury. For example, in the charge, at page 8 of the defendant's brief, the court adopts the language used by Shearman on Negligence, as follows:

> "For if, by culpable negligence, he brought himself or his property into circumstances of such difficulty or peril as to make it impossible for him to escape from them without injuring his neighbor, he cannot excuse himself by showing that he would have done more injury if he had left himself or his property where it was. His original fault deprives him of the right to plead inevitable accident. And the occurrence of inevitable accident does not excuse the omission of care to prevent the consequences of the accident from extending further than is inevitable. * * * Negligence is not always necessarily culpable. There are many cases in which it might be desirable that a greater degree of care should be used than the law requires; but it is only the lack of such care or diligence as the law demands, in the particular case, which constitutes culpable negligence. And the law makes no unreasonable demand. It does not require from any man superhuman wisdom or foresight. Therefore no one is guilty of culpable negligence by reason of failing to take precautions which no other man would be likely to take under the circumstances. If one uses every precaution which the present state of science affords, and which a reasonable man would use under the circumstances, he is not responsible for omitting other precautions which are conceivable, even though if he had used them, the

injury would certainly have been avoided. So, if he uses all the skill and diligence which can be obtained by reasonable means, he is not responsible for failure. * * * *

"A railroad company is, however, only bound to provide against dangers which can reasonably be foreseen; and it is not guilty of culpable negligence in not securing the track against events which would not be anticipated by reasonable men of the ordinary sagacity required in the business, such, for example, as an unprecedented flood or frost. But dangers which might reasonably be expected to occur, though rarely, must be guarded against."

The court said, in commenting on these extracts:

"I think it proper that I should explain to you the sense of the expression to which I have just called your attention. [That is that they are to exercise extraordinary vigilance.] It does not mean that this railway was to exercise more remarkable or more peculiar diligence than is usually used. Some common carriers are held to ordinary diligence. That is why I rejected certain prayers offered on the part of the defendant; because in those prayers I was asked to instruct you gentlemen that if those operating this train had exercised ordinary diligence your verdict should be for the defendant. The court says: 'Extraordinary diligence.' And that is the rule which you are to take for your guidance in considering this case. * * *

"Now, if you find, as I have told you here, that while this train was going right through that tunnel, that cut, or I will say further, while it was within such a distance that the train could not have been stopped in time to avoid this land slide which came upon it, or if it had happened within such a short time before the

train approached that curve that the railroad company could not, by the use of a sufficient number of competent men in their employment (if you find such was the case), have given warning of it, the railroad company is not answerable.

"And right here comes in the question of fact for you to decide. On behalf of the plaintiff, Mr. Miller says the proof shows that that obstruction was there. But he first says that the road was not walked over sufficiently; that it is not enough to have one lad walking at intervals up and down that road. Beauregard Stewart said that he left Rockfish at six o'clock, and at seven p. m. he had walked to north of Faber's. He was, therefore, a mile and a quarter from this place when this accident happened at 8.45. You are to find whether that was a sufficient inspection of the state of things along that road."

It seems to us that taking the instructions and the charge together, the court has fairly stated the rules of law as to the presumptions of neglect and the measure of diligence, and we see no error requiring the granting of a new trial.

APR 2 1891
JAMES H. MCKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

JAMES M. T. GLEESON,
PLAINTIFF IN ERROR,

vs.

THE VIRGINIA MIDLAND RAILWAY COMPANY,
DEFENDANT IN ERROR.

No. 287.

Brief for Defendant in Error.

LINDEN KENT,
Attorney for Defendant in Error.

WASHINGTON, D. C.:
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1891.

Supreme Court of the United States.

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JAMES M. T. GLEESON, PLAINTIFF IN ERROR,

v.

THE VIRGINIA MIDLAND RAILWAY COMPANY, DEFENDANT IN ERROR.

No. 287.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR THE DEFENDANT IN ERROR.

This was an action brought by the plaintiff to recover damages for an injury sustained by him in an accident to the cars of the defendant on the evening of the 15th of January, 1882, under the following circumstances:

On Sunday, January 15, 1882, the plaintiff, who was a postal clerk, left Washington on the car of the defendant to go to Danville, Virginia, which was the end of his route. The train on which he embarked met with certain delays from landslides at Orange Court-House, a point north of Charlottesville on the said road, remaining there until three trains had arrived, when the mail, which was in charge of

the plaintiff, was transferred from the said train to another train on the south side of the obstruction, and on this new train the plaintiff proceeded on his southward journey towards Charlottesville. He left Charlottesville for Lynchburg and Danville about 7.30 P. M. About an hour and a half thereafter the train ran into a landslide; the locomotive and tender left the track and the mail car next was precipitated on the tender, crushing the engineer so that he died in a short time and seriously injuring the fireman.

The plaintiff, Gleeson, at the time, was in the postal car in the discharge of his duties, and was thrown forward by the shock of the collision, and received the injuries complained of.

The scene of the accident was in a cut made by said railroad, 15 or 20 feet in depth, and the cause of the accident was the sliding in of the west embankment as the train arrived at that point.

The plaintiff offered no evidence tending to show negligence on the part of the defendant except the simple remark made by a witness that the "train ran at a speed "more rapid than usual, so much so as to be a subject of "remark by those in the mail car."

On behalf of the defendant the evidence tended to prove that the train, at the time of the accident, was not running at more than its usual rate of speed, about 20 miles an hour; that the engineer and fireman were competent men, and were in their proper places in the discharge of their duties at the time of the accident; that the fireman was on the lookout on the left-hand side of the engine, and saw nothing of the landslide, and that the engineer who was killed neither said nor did anything to indicate to the fireman that he saw the landslide that caused the accident.

Evidence was given by the defendant tending to show that the landslide occurred contemporaneously with the passage of the train; that it struck the passing train, and caused the accident complained of; that heavy rains had fallen on the evening of Friday and the morning of Saturday, the 13th and 14th of January.

Evidence was introduced tending to prove that the track was in good condition and that it was properly constructed, and that proper precautions were taken with respect to track inspection; that this same train, piloted by the same engineer who was killed, had passed that spot with safety going north in the morning at about seven o'clock; that about an hour and a half before the accident the defendant had sent out a track walker, whose duty it was to inspect the track and see that everything was in proper condition; that he passed this spot about seven o'clock in the evening, before this train, and found everything in good condition. No train had passed the point between that time and the accident, and there was no reason or grounds for apprehending danger, and no evidence of a landslide.

In a word, there was no proof introduced tending to show that the defendant had left any duty unperformed which pertained to the running of this train, except the above remark with respect of speed. There was no testimony tending to show that there was any defect in or about the track itself. There was no testimony tending to show that there was any defective construction of the track at this point. On the other hand, there was testimony to the effect that the road was properly constructed; that the proper precautions were taken for its inspection; that the train was carefully and skilfully run; that the employés were skilful men; and that the engineer and fireman were at their posts of duty, and were faithful in its discharge, in which one lost his life.

The plaintiff himself introduced evidence to show that the cause of the accident was the sliding of the embankment from a natural hill left by the defendant when it graded for its road-bed and constructed the railroad.

The accident, both from the testimony of the plaintiff and that of the defendant, it appears was caused immediately by the act of God and did not result from human agency.

Whatever may have been the relations of the defendant to the accident with respect of a different construction of its road or a better inspection thereof, and to what extent the neglect of duty, if any there was, may have contributed to the accident, nevertheless it is a fact in the case that the immediate and proximate cause of the accident was an act of God.

To these facts the law must be made applicable.

And thereupon, on the request of the defendant, the Court gave the following prayer:

"*The burden of proof is on the plaintiff to show that the* "*defendant was negligent, and that its negligence caused the* "*injury,*" to which the plaintiff requested a modification by adding thereto the words, '*but that the injury to the plain-* "*tiff upon the car of the defendant, if the plaintiff was in* "*the exercise of ordinary care, is prima facia evidence of* "*the Company's liability.*"

The Court's refusal to thus modify the prayer was made the

FIRST ASSIGNMENT OF ERROR BY THE PLAINTIFF.

There can be no question about the correctness of the law as laid down by the Court in the prayer as given.

the question of negligence must be determined in the light of such testimony and not upon *presumptions* inconsistent therewith. The *presumption* of negligence arises where the accident is caused by some defect in that which is under the control of the defendant. The *presumption* vanishes when it is shown that the accident was due to the forces of nature.

The Supreme Court of the United States has considered this doctrine thoroughly in the case of *Railroad Company* v. *Reeves*, 10 *Wallace*, 176, above cited. That was a case in which tobacco owned by the plaintiff and shipped on the cars of the defendant was injured by a freshet which overtook it. It was contended that there had been unnecessary delay in the shipment of the goods, and without this they would not have been injured because they would have passed the point of the freshet before the danger. The Court says:

"We will only notice one of the rejected instructions, " the fourth. It was prayed in these words: 'When the " 'damage is shown to have resulted from the imme- " 'diate act of God, such as a sudden and extraordinary " 'flood, the carrier would be exempt from liability unless " 'the plaintiff shall prove that the defendant was guilty " 'of some negligence in not providing for the safety of " 'the goods. That he could do so must be proven by the " 'plaintiff, or must appear in the facts of the case.' It is " hard to see how the soundness of this proposition can " be made clearer than by its bare statement. A common " carrier assumes all risks except those caused by the act " of God and the public enemy. One of the instances " always mentioned by the elementary writers of loss by " the act of God is the case of loss by flood and storm. " Now, when it is shown that the damage resulted from " this cause immediately, he is excused. What is to make " him liable for this? No question of his negligence " arises unless it is made by the other party. It is not

Does the modification requested by the counsel for the plaintiff, as a separate and independent proposition, correctly state the law applicable to this case?

We say that it does not, and there was no error in refusing it.

In other words, it was contended that notwithstanding the fact that the proximate cause of the accident was an act of God, that still the burden of proof was upon the defendant to show that it was not liable for the injury sustained by the plaintiff.

It is true that the presumption of negligence from the simple happening of the accident in which a passenger is injured may arise where the accident results from any defective arrangement, mismanagement, or misconstruction of the thing over which the defendant has immediate control, and for the management, service, and construction of which it is responsible, or where the accident results from any omission or commission on the part of the railroad company with respect to those matters entirely under its control. According to the current of authorities the presumption of negligence on the part of the defendant arises in such cases.

Le Barron v. *East Boston Ferry Co.*, 11 *Allen*, 316.
Western Transportation Co. v. *Downey*, 11 *Wallace*, 129.
Clarke v. *Barnwell*, 12 *Howard*, 272.
2 *Redfield on Railways*, 256.
Shoemaker v. *Kingsbury*, 12 *Wallace*, 369.
Railroad Company v. *Reeves*, 10 *Wallace*, 176.

The injury in this case having resulted from an act of God established as a *fact*, the *presumption* of negligence from the simple occurrence of the accident cannot arise. Where facts or testimony are substitute for *presumptions*

" necessary for him to prove that the cause was such as to " release him and then to prove affirmatively that he did not " contribute to it. If after he has excused himself by show- " ing the presence of the overpowering cause, it is charged " that his negligence contributed to the loss, the proof of " this must come from those who assert or rely upon it."

The same rules apply to the carriers of passengers, and the law as stated above is so applied in the case of *Gillispee* v. *St. Louis & Kansas City RR. Co.*, 6 *Missouri Appeals*, 564.

It is manifest upon principle that it must be so applied, for in the case of passengers common carriers are not insurers of safety. They are only charged with a high degree of vigilance supplemented by the highest degree of skill, and are always exempt from damages caused by the act of God and the public enemy, whereas as carriers of freight they are insurers for safe carriage. It does not become a question of the degree of negligence, or the duty imposed, and the only exemptions are those risks caused by the act of God and the public enemy.

The facts in the above-cited case from 6th Missouri Appeals are quite similar to those of the case at bar. The Court there said:

" There it came out as a part of the plaintiff's case " that the rain-storm was one of extraordinary violence " and seemingly adequate to produce the injury. The " defendant might have rested on the plaintiff's evidence, " and have contended before the jury that the sole effici- " ent cause of the accident was the sudden and extraor- " dinary storm."

After citing the evidence of the storm, they proceeded:

" Here the plaintiff could not ignore this and similar " evidence, *and thus assume that, like the plaintiff who*

" *proves merely such an accident as tends to show neglect*
" *in a carrier, she had cast the burden upon the defendant.*
" The burden lay on her to show that, notwithstanding the
" operation of the act of God in the case, the negligence
" of the defendant caused the injury, or actively co-oper-
" ated with the act of God to produce it. Even if it could
" be stated, without qualification, which it cannot, that in
" an action against a carrier by a passenger mere proof
" of the accident and injury shifts the burden, that rule
" would not apply to a case *where the plaintiff's own evi-*
" *dence shows the act of God as an operating and, possibly,*
" *sufficient cause.*"

It is very clear that this case at bar did not belong to that category of which it might be said, without qualification, that the mere proof of the accident shifted the burden of proof. That the proof of the accident created *prima facie* presumption of negligence. In this case the presumption was not permitted to operate, because the plaintiff himself undertook to substitute for presumption the actual facts of the occurrence, and in doing so he at once discloses what was the real cause of the accident, to wit, the act of God in the sliding down upon the train of a natural hill, softened and disintegrated by heavy rains.

These facts having been produced, not only destroyed the presumption of negligence on the part of the plaintiff, but standing alone fixed the immediate and proximate cause as the act of God, thereby relieving the defendant from the presumption of negligence and casting upon the plaintiff the burden of proving the same.

We therefore submit that the immediate and proximate cause of the accident having been disclosed as an act of God, it was not error for the Court to refuse to modify the first prayer of the defendant by adding to it as applicable to this case the words: " *But that the injury*
" *to the plaintiff upon the car of the defendant, if the*

"*plaintiff was in the exercise of ordinary care, is prima*
"*facie evidence of the Company's liability.*"

It will be noted that this request is made after all the evidence in the case was in, and after the plaintiff himself had developed the cause and circumstances of the accident; consequently it was proper that the Court should submit the case to the jury to be determined with reference to the testimony and not presumptions, and this it did by leaving it to the jury to determine the question of negligence upon the testimony.

In any event it is difficult to ascertain what ground of compiaint the plaintiff had, for while the Court refused to modify the prayer as requested, it suffered the case to go to the jury upon the question of negligence on the testimony, although there was in point of fact no testimony tending to show negligence other than the happening of the accident.

To have given the modification asked in the light of the plaintiff's testimony would have been practically to have said to the jury, "It is true that the plaintiff has shown by "his testimony that the act of God was the proximate "cause of the injury, but I direct you to ignore these cir- "cumstances of this case. It is only sufficient for you to "know in this case that an accident happened and the "injury resulted, and that the defendant is not only negli- "gent but is liable for such injuries, unless he can and has "shown affirmatively that he was not negligent."

In this view the case is distinguished from the cases of—

Stokes v. *Saltonstall*, 13 *Peters*, 181.

Railroad Co. v. *Pollard*, 22 *Wallace*, 341.

But the instruction that the Court did give upon the request of the plaintiff covers the case fully on this point. It was as follows:

" The defendant, as a common carrier, is responsible for
" injuries received by the plaintiff in the course of his trans-
" portation which might have been guarded against by the
" exercise upon their part of extraordinary vigilance, aided
" by the highest skill, and this caution and vigilance must
" necessarily be extended to all the agencies or means em-
" ployed by the carrier in the transportation of passengers.
" Its engagement was that as far as human care and
" foresight could go it would transport with safety the
" passenger."

The defendant was thus made responsible under this instruction if the accident could have been avoided by human care and foresight, and this rule was made applicable to every instrumentality of the transportation. It applied to the construction of the track, and the maintenance of the track, and the inspection of the track, and to all the instrumentalities used upon the track. No exception whatever is made. A more rigid rule could not have been applied against the defendant.

The next

ASSIGNMENT OF ERROR

is the granting of the third prayer of the defendant, which is as follows :

" The Court instructs the jury that whilst a high degree
" of caution is expected generally from railway companies
" in order to avert accident, the caution applies only to
" those accidents which could be prevented or averted by
" human care and foresight, and not to accidents occur-
" ring solely from the act of God. If they believe that the
" track and instruments of the defendant were in good order,
" its officers sufficient in number and competent, and that
" the accident did not result from any deficiency in these
" requirements, but from a slide of earth caused by recent
" rains, and that the agents and servants of the Company
" had good reason to believe that there was no such ob-

" struction in its track, and that they could not, by the " exercise of great care and diligence, have discovered it " in time to avert the accident, then they should find for " the defendant."

This instruction introduces into the case the element of the act of God as an operating cause. This instruction is designed to properly inform the jury with respect to the law where the accident is caused by the act of God, and the degree of care and diligence which the defendant is bound to exercise as against such.

The first objection urged against this prayer by the plaintiff is that it assumes that the accident was caused by an act of God. It will appear from the mere reading of the instruction that there is no such assumption.

The second objection to the prayer is that it does not hold the Company responsible for the condition of the sides of the cut made in the construction of the road. It does impose upon the defendant the obligation of having the track and instruments in good order, and the fact that the accident should not result from any deficiencies in these requirements. The exemption of the defendant in this prayer was predicated on his having done all that was necessary with respect to the track and construction, and upon the assumption that there was no deficiency in anything that the defendant had done. That not only had there not been any neglect on its part, but that it had fully met the requirements of the situation.

The third objection to the instruction is, that it does not impose upon the defendant the high degree of care and diligence required of carriers of passengers. The very high degree of care and diligence required of common carriers to their passengers was carefully set out in the third instruction granted in the instructions for the plaintiff printed above in this brief. This was the rule laid down

in *Roy* v. *Rwy. Co.* (102 *U. S.* 451). This is the rule where the act of God is not the operating cause in producing the accident.

This instruction is intended to recognize the difference between the responsibility of the common carrier as against the acts of God and as against those perils which the carrier is answerable for. Under it the carrier is held to the highest degree of foresight and care as against those perils for which it is answerable, but the law does not impose on it any such liability as against an act of God. Where the act of God is the proximate cause the carrier is held only to such foresight and care as an ordinarily prudent person or company in the same business would show in the same case.

Le Barron v. *Ferry Co.*, 11 *Allen*, 316.
McClaney v. *Sioux City & P. R.R. Co.*, 3 *Neb.* 44.
R.R. Co. v. *Reeves*, 10 *Wallace*, 190.

The degree of care and diligence in this prayer is confined to and intended to apply only to an accident which resulted from the act of God, and it is submitted that under the authorities it correctly states the doctrine.

The sliding down of a natural hill, caused by the disintegration of the earth by heavy rains, was results from the forces of nature, or an "act of God." It may or may not have been a force so apparent as to have been avoided by some act of the defendant, and the Court does not preclude the case under this aspect, but submits it to the jury to determine whether or not there was a liability on the part of the defendant, notwithstanding the jury might find that the act of God was the proximate and operating cause. What the Court did do was to shift the burden of proof where it appeared that the act of God was the apparent and possibly sufficient cause. This is the doctrine

laid down by the cases cited above; consequently it was not proper upon the assumption that the act of God was the proximate cause to instruct that the defendant should have exercised the extreme care and judgment usually required of common carriers in the transportation of passengers.

The cases cited on the brief of the plaintiff in error on the question of Burden of Proof will be found to be cases where the cause of the injury resulted from some defect or negligence in management or construction of some thing over which the defendant had immediate control.

In the case of *Brehn* v. *G. W. Ry. Co.*, 34 *Barb.* 268, which was cited as a case especially similar to the one at bar, the Court on that point gave the following instruction: "But if the injuries were produced by the defendants running its train into a breach in its road where an embankment belonging to the road had given away, these facts, standing alone and unexplained would be *prima facie* evidence of such negligence;" and the reasoning was that it was a structure that the defendant had built, and that it was entirely under its control, and that when it washed away and left a hole in which the train was precipitated it was *prima facie* evidence of negligence.

In the case of *P. & R.R. Co.* v. *Anderson*, 94 *Penn. St.* 351, another case cited as similar, it was in evidence that the *embankment was washed away because of insufficient drainage.*

The other cases were those where there was evidence of negligence in some matter directly under the management of the defendant.

The further *assignment of error* was in granting the *fourth* prayer upon the request of the defendant, as follows:

" If the jury believe from the evidence that the defend-
" ant's instruments, human and physical, were suitable
" and qualified for the business in which it was engaged ;
" that the accident complained of was caused by the shak-
" ing down of the earth which had been loosened by the
" recent rains, and that the earth was shaken down by the
" passing train, then the accident was not such an act of
" negligence for which the defendant would be responsi-
" ble, and the jury should find for the defendant."

This prayer, taken in connection with the other prayers, precludes the interpretation sought to be put upon it ; that it excludes any inquiry into the negligence of the defendant. In the first place, it is predicated upon the condition that the defendant's instruments, human and physical, were suitable and qualified to the business in which it was engaged. Now, the track and the manner of construction was one of the physical instruments. Now, applying the prayer to their condition, what the Court meant to say was that under these conditions the falling of the earth by the vibrations caused by the train was not alone such an act of negligence which would make the defendant liable, and this is the interpretati on that must be necessarily given to it when read in connection with the prayers granted at the request of the plaintiff.

LINDEN KENT,
Attorney for Deft. in Error.

March 20, '91.

SUPREME COURT OF THE UNITED

No. 337

THE BANK OF LEWISBURG, APPEL

vs.

[illegible] PRESTLEY AND JAMES DUNN

TROUTEES.

[illegible] THE DISTRICT COURT OF THE UNITED
THE DISTRICT OF WEST VIRGINIA.

[illegible] FEBRUARY TH, 1888.